Supreme Court, U.S.
FILED

No. _____
10-960

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In The

Supreme Court of the United States

SERDAR KALAYCIOGLU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a defense attorney's misadvice about a defendant's sentencing exposure can violate a defendant's Sixth Amendment right to the effective assistance of counsel?

Whether the Eleventh Circuit should have granted a Certificate of Appealability to review the issue presented in Argument I?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are as in the caption.

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CONSTITUTIONAL PROVISION

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the final order of the United States Court of Appeals for the Eleventh Circuit denying a Certificate of Appealability in this case and dismissing his appeal.

OPINIONS BELOW

The unpublished Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's application for a Certificate of Appealability and dismissing his appeal is reprinted in the appendix at App. 1. The unpublished Order of the United States District Court for the Southern District of Florida (hereinafter "District Court") denying Petitioner's Motion for Certificate of Appealability is reprinted in the appendix at App. 2. The unpublished Order of the District Court adopting the Magistrate's Report and Recommendation and denying Petitioner's motion to vacate, set aside and correct sentence pursuant to 28 U.S.C. § 2255 is reprinted in the appendix at App. 4. The unpublished Report and Recommendation of the United States Magistrate Judge for the Southern District of Florida recommending denial of Petitioner's motion to vacate, set aside and correct sentence pursuant to 28 U.S.C. § 2255 is reprinted in the Appendix at App. 7. The unpublished Judgment in a Criminal Case of the District Court is reprinted in the Appendix at App. 40. The unpublished Amended Judgment in a

Criminal Case of the District Court is reprinted in the Appendix at App. 49.

JURISDICTION

The Order of the Eleventh Circuit denying Petitioner's application for a Certificate of Appealability and dismissing his appeal was entered on October 25, 2010. (App. 1). This petition for a writ of certiorari is filed within ninety days of that date as required by Supreme Court Rule 13.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. This Court has jurisdiction to review a final order of a United States Court of Appeals denying a Certificate of Appealability. *Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition Below

On April 10, 2003, a 14-count superseding indictment was returned in this case against Petitioner and three co-defendants in the United States District Court for the Southern District of Florida. The first 13 counts of the superseding indictment, of which Petitioner was the sole defendant, charged violations of 18 U.S.C. §§ 1343 and 2. These counts arose out of transactions between Petitioner, his three co-defendants and various individuals who approached him about investing in certain financial programs. The remaining count (Count 14) charged Petitioner and his three co-defendants with violating 18 U.S.C. §§ 1343, 1346, 371, and 2. This count arose out of a government sting operation code-named "Bermuda Shorts," and alleged a conspiracy to commit wire fraud to deprive another of "honest services" by arranging, or conspiring to arrange, a kickback for representatives of a fictitious English mutual fund in return for investing with the Petitioner and his co-defendants.

On December 1, 2003, Petitioner proceeded to a jury trial pursuant to the superseding indictment.

The jury convicted Petitioner on all counts except two of the wire fraud counts (Counts 8 and 9).

Subsequently, Petitioner was sentenced to a term of imprisonment of 324 months. This sentence was imposed after the district court ruled that the proper United States Sentencing Guidelines offense level in sentencing Petitioner was offense level 41. This Guidelines offense level of 41 had a sentencing range of 324 to 405 months imprisonment for a person like Petitioner who had no criminal history, and was calculated as follows:

Base offense level:	6
Amount of actual and intended loss of over $40 million:	plus 17
More than minimal planning and more than one victim:	plus 2
Misrepresentation that the defendant was acting on behalf of a government agency:	plus 2
Substantial part of the scheme was committed outside the United States and the offense involved sophisticated means:	plus 2
The offense substantially jeopardized the safety of a financial institution and the defendant derived more than $1 million in gross receipts from the offense:	plus 4
Organizer/leader enhancement:	plus 4
Abuse of a position of public or private trust:	plus 2
Adjustment for obstruction of justice:	plus 2

Petitioner's three co-defendants were each sentenced to probation.

Petitioner's conviction and sentence were affirmed on direct appeal on December 11, 2006. *See United States v. Kalaycioglu*, 201 Fed.Appx. 825 (11th Cir. 2006). Thereafter, Petitioner filed a petition for certiorari in this Court. On October 1, 2007, in *Kalaycioglu v. United States*, 552 U.S. 811 (2007), this Court denied Petitioner's petition for a writ of certiorari.

On October 1, 2008, Petitioner timely filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 in the United States District Court for the Southern District of Florida, based upon a claim that he was denied his right to the effective assistance of trial counsel under the Sixth Amendment of the United States Constitution. The magistrate judge determined that an evidentiary hearing was required on Petitioner's claim that, *inter alia*, his trial counsel was ineffective for misinforming him about his maximum sentencing exposure under the United States Sentencing Guidelines.

On December 30, 2009, an evidentiary hearing on Petitioner's Section 2255 Motion was held. At that evidentiary hearing, trial counsel acknowledged that, prior to Petitioner's convictions, trial counsel "didn't anticipate as high a sentence as the defendant ultimately got." Trial counsel further testified that, after the superseding indictment was returned and before Petitioner was convicted, trial counsel told Petitioner

that Petitioner's "best guideline[sic] scenario . . . was somewhere between five and ten years" and his worst [United States Sentencing] Guidelines scenario was more than 20 years imprisonment but *less than* the sentencing range of 324 to 405 months of imprisonment provided by Guidelines offense level 41 for defendants like Petitioner who had a Guidelines criminal history category of one. Indeed, trial counsel expressly testified as follows:

> I agree that Dr. Kalaycioglu, until Judge Hurley meted out a sentence that was far beyond what I think, in my experience, for Dr. Kalaycioglu, for this case, for even [Assistant U.S. Attorney] Roger Stefan's arguments was a fair sentence, it was off the charts, and I don't think until that happened, that Dr. Kalaycioglu had any real appreciation for what the worst possible case scenario under the guidelines could be . . . . ***If he didn't fully understand, it's my fault.***

Thus, assuming *arguendo* that trial counsel's testimony was truthful as the magistrate judge found, it is undisputed that trial counsel misadvised Petitioner about his sentencing exposure under the United States Sentencing Guidelines if he was convicted after a trial.

It is also noteworthy that, at the evidentiary hearing, Petitioner's Canadian civil attorney at the time of Petitioner's trial and an attorney who assisted Petitioner in the pre-trial phase of this case as

co-counsel in this case testified that, after the superseding indictment was returned, Petitioner's trial counsel told Petitioner in their presence that his estimation of Petitioner's sentencing exposure if Petitioner was convicted as charged was far below the sentence of 324 months that Petitioner received.[1]

Petitioner's trial counsel additionally testified at the evidentiary hearing that, on the first day of the trial, the prosecutor in this case offered to allow Petitioner to plead guilty to two counts of the superseding indictment pursuant to a plea agreement that would provide that Petitioner would be sentenced to no more than 10 years of imprisonment. Petitioner's trial counsel further testified that Petitioner rejected this plea offer but, as previously explained, Petitioner's trial counsel himself acknowledged that he misadvised Petitioner about his sentencing exposure. Thus, even assuming *arguendo* that Petitioner's trial counsel's testimony was truthful, it is undisputed that, because of the misadvice of trial counsel, Petitioner did not fully understand the risks of going to trial.

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[1] Petitioner's Canadian civil attorney testified that Petitioner's trial attorney told Petitioner in his presence that he estimated that Petitioner's sentencing exposure if convicted was two years. The attorney who assisted Petitioner in the pre-trial phase of this case testified that Petitioner's trial attorney told Petitioner in her presence that the maximum sentence he faced if convicted was 51 to 63 months. Petitioner testified that his trial counsel told him that, if he was convicted, his maximum sentencing exposure would be less than ten years and that, but for this bad advice, he would have accepted a plea offer of ten years from the government.

On April 22, 2010, the magistrate judge entered a Report and Recommendation concerning Petitioner's Section 2255 Motion in which the magistrate judge recommended that Petitioner's Section 2255 Motion be denied (hereinafter "Report and Recommendation"). (App. 7-38). In the Report and Recommendation, the magistrate judge found that the previously described testimony of Petitioner's trial counsel was credible. (App. 20). The magistrate judge ruled, *inter alia*, as follows:

> Finally, even though [trial counsel] Mr. Kuehne did not anticipate all of the sentencing enhancements ultimately imposed by the District Court, such is insufficient to demonstrate ineffectiveness. The case law is clear that "an attorney's mere inaccurate prediction of a sentence does not demonstrate the deficiency component of an ineffective assistance of counsel claim." *United States v. Martinez*, 169 F.3d 1049, 1053 (7th Cir. 1999) (*internal quotations omitted*).

(App. 22-23). On May 13, 2010, the District Court entered an Order adopting the Report and Recommendation and denying Petitioner's Section 2255 Motion. (App. 4-6).

Subsequently, in the District Court, Petitioner timely filed a notice of appeal. On June 29, 2010, the District Court entered an Order denying Petitioner's request for a Certificate of Appealability pursuant to Fed.R.App.P. 22(b) and 28 U.S.C. § 2253(c). (App. 2-3). Petitioner then filed a request for a Certificate of

Appealability in the Eleventh Circuit pursuant to 28 U.S.C. § 2253(c) and Fed.R.App.P. 22(b). However, the Eleventh Circuit denied that request. (App. 1).

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT IN THE CIRCUITS ON WHETHER A DEFENSE ATTORNEY'S MISADVICE ABOUT A DEFENDANT'S SENTENCING EXPOSURE CAN VIOLATE A DEFENDANT'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution guarantees a defendant in a criminal case the effective assistance of counsel. U.S. Const. amend. VI; *Cuyler v. Sullivan*, 466 U.S. 335, 344 (1980). To obtain post-conviction relief due to ineffective assistance of counsel, defendants must show that their counsels' performance was deficient and that the deficiency prejudiced their defense. *E.g., Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003).

To establish deficient performance, a defendant must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). That standard is one "requiring that counsel research relevant facts and law or make an informed

decision that certain avenues will not be fruitful." *United States v. Herrera*, 412 F.3d 577, 580 (5th Cir. 2005) (citations and footnote omitted).

To establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

In *United States v. Herrera*, 412 F.3d 577 (5th Cir. 2005), the Fifth Circuit Court of Appeals described the importance of an attorney's role in counseling his client as to whether or not he should accept a plea agreement:

> One of the most important duties of an attorney representing a criminal defendant is advising the defendant about whether he should plead guilty.
>
> An attorney fulfills this obligation by informing the defendant about the relevant circumstances and the likely consequences of a plea. Apprising a defendant about his exposure under the sentencing guidelines is necessarily part of this process. A defendant cannot make an intelligent choice about whether to accept a plea offer unless he fully understands the risks of proceeding to trial. Failing to properly advise the defendant of the maximum sentence that he could receive

> falls below the objective standard required by *Strickland*.

Id. at 580 (citations and quotations omitted).

In *Herrera*, the defendant's attorney allegedly advised his client to reject a plea agreement which would have subjected him to a maximum imprisonment term of 48 months under the United States Sentencing Guidelines (hereinafter "the Guidelines"). According to the defendant, his counsel's alleged advice was based on a mistaken belief that the defendant would face a maximum Guidelines sentence of 51-months imprisonment if he were found guilty at trial. However, the defendant actually faced a sentencing range of 78 to 97 months under the Guidelines if he went to trial and was convicted. The defendant, who stood trial, was convicted and received a 78-month sentence, maintained that he would have accepted the plea agreement if he had understood his true sentencing exposure at trial. On appeal from the district court's denial of the defendant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, the Fifth Circuit held that an attorney who underestimates his client's sentencing exposure under the Guidelines by 27 months performs deficiently because he does not provide his client with the information needed to make an informed decision about accepting a plea offer or going to trial. In remanding the case to the district court for an evidentiary hearing, the Fifth Circuit also noted that the district court had not had the benefit of its decision in *United States v. Grammas*, 376 F.3d 433, 439 (5th Cir.

2004), when it dismissed the defendant's motion to vacate.

In *Grammas*, the record showed that the defendant's attorney had misadvised the defendant about his sentencing exposure under the Guidelines. More specifically, the defendant's attorney erroneously advised the defendant that he faced six to 12 months imprisonment under the Guidelines when, in fact, the defendant faced 70 to 87 months imprisonment under the Guidelines. The Fifth Circuit explained that this misadvice was both a deficient performance and prejudicial relying upon this Court's decision in *Glover v. United States*, 531 U.S. 198, 203 (2001), which held that "*any* amount of actual jail time [caused by defense counsel's deficient performance] has Sixth Amendment significance." (emphasis added). Accordingly, the Fifth Circuit held that an attorney who underestimates his client's sentencing exposure under the Guidelines by *any* amount of actual jail time denies his client his Sixth Amendment right to effective assistance of counsel.

The D.C. Circuit and the Third Circuit have also held that a defense attorney's misadvice about a defendant's sentencing exposure under the Guidelines can constitute ineffective assistance of counsel. *United States v. Gaviria*, 116 F.3d 1498, 1512 (D.C. Cir. 1997) (a defendant satisfied the "deficient performance" prong of *Strickland*, *supra*, where defense counsel's representation that the defendant would be sentenced as a career offender following a plea and that his Sentencing Guidelines range would therefore be

enhanced to 360 months to life imprisonment was incorrect, because the defendant could not be sentenced as a career offender under the Guidelines and defense counsel should have been aware of that Guidelines law); *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992) (defense counsel was ineffective under *Strickland*, *supra*, where he failed to advise the defendant that he might be classified as a career offender and subject to enhanced penalties under the Sentencing Guidelines, because "familiarity with the structure and basic content of the Guidelines (including the definition and implications of career offender status) has become a necessity for counsel who seek to give effective representation") (footnote omitted).

By contrast, the Seventh and Tenth Circuits have taken a very different approach concerning whether defense counsel's incorrect advice about a defendant's sentencing exposure constitutes ineffective assistance of counsel. *See United States v. Martinez*, 169 F.3d 1049, 1053 (7th Cir. 1999) (an attorney's "mere inaccurate prediction of a sentence" does not demonstrate the deficient performance component of an ineffective-assistance claim); *United States v. Gordon*, 4 F.3d 1567, 1570 (10th Cir. 1993) ("A miscalculation or erroneous sentence estimation regarding the Guidelines by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel."), *cert. denied*, 510 U.S. 1184 (1994).

The Court in *United States v. Marcos-Quiroga*, 478 F.Supp.2d 1114, 1137-38 (N.D. Iowa 2007), expressly noted that there is a split in the Circuits

concerning whether incorrect advice by defense counsel in determining sentencing exposure can constitute ineffective assistance of counsel. That Court held that "the better reasoned and more realistic side of this split" is the one recognizing that a defense attorney's misadvice about a defendant's sentencing exposure can violate a defendant's Sixth Amendment right to the effective assistance of counsel. *Id.* at 1138.

The district court in this case cited to *Martinez*, *supra*, and ruled that "[e]ven though [defense counsel] Mr. Kuehne did not anticipate all of the sentencing enhancements ultimately imposed by the District Court, such is insufficient to demonstrate ineffectiveness" because "an attorney's mere inaccurate prediction of a sentence does not demonstrate the deficiency component of an ineffective assistance of counsel claim." App. 22-23. As previously explained, this ruling conflicts with the law of at least three other Circuits. This Court's guidance is needed to resolve these conflicts and to protect the constitutional right to the effective assistance of counsel of individuals charged with crimes.

II.

CERTIORARI SHOULD BE GRANTED TO ANSWER THE QUESTION OF WHETHER THE ELEVENTH CIRCUIT SHOULD HAVE GRANTED A CERTIFICATE OF APPEALABILITY TO REVIEW THE ISSUE PRESENTED IN ARGUMENT I.

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court discussed the standards governing the issuance of Certificates of Appealability.[2] This Court began by re-affirming the basic criteria set forth in *Slack v. McDaniel*, 529 U.S. 473 (2000), *i.e.*, that a petitioner "need only demonstrate 'a substantial showing of the denial of a constitutional right'" – a showing that is satisfied "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Cockrell*, 123 S. Ct. at 1034, quoting *Slack*, 529 U.S. at 484. This Court, however, disagreed with the Fifth Circuit's application of this standard.

In reversing the Fifth Circuit's denial of a Certificate of Appealability, this Court emphasized that the *Slack* standard "does not require a showing that the

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[2] Although this Court in *Cockrell* was considering the standards in the context of a habeas petition filed by a State prisoner under 28 U.S.C. § 2254, the same standards apply to Petitioner's motion to vacate filed under 28 U.S.C. § 2255.

appeal will succeed" and that an application should not be denied simply because the court "believes the applicant will not demonstrate an entitlement to relief." *Id.* at 1039. The certificate requirement is merely a "threshold, or gateway, test" and does not even require that a petitioner show "that some jurists would grant the petition for habeas corpus." *Id.* at 1040. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*

The issue raised in Argument I herein was, at the very least, "debatable" and thus deserving of a Certificate of Appealability. Accordingly, Petitioner respectfully requests that this Court grant his Petition for Certiorari in order to answer the question of whether the Eleventh Circuit erred in denying a Certificate of Appealability as to the issue raised in Argument I herein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Miami, Florida
January 24, 2011

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-12597-D

SERDAR KALAYCIOGLU,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Oct. 25, 2010)

ORDER:

Serdar Kalaycioglu's motion for a certificate of appealability, in order to appeal the denial of his 28 U.S.C. § 2255 motion, is DENIED because he has failed to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000).

/s/ Ed Carnes
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO, 08-81118-CIV-HURLEY

SERDAR KALYCIOGLU [sic],

petitioner,

v.

UNITED STATES OF AMERICA,

respondent.
_____/

ORDER DENYING MOTION FOR CERTIFICATE OF APPEALABILITY

THIS CAUSE is before the court upon petitioner's notice of appeal filed June 02, 1010 [sic] [DE# 40] which the court construes as a motion for certificate of appealability pursuant to Fed. R. App. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For reasons expressed in Magistrate Judge Hopkins' Report and Recommendation [DE# 37], the court concludes that the petitioner fails to make a substantial showing of the denial of a constitutional right.

Accordingly, it is **ORDERED** and **ADJUDGED**:

Petitioner's notice of appeal, construed as a request for certificate of appealability, [DE #40] is **DENIED**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 29th day of June, 2010.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States
District Judge

Copy provided to: all parties

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-81118-CIV-HURLEY/HOPKINS

SERDAR KALAYCIOGLU,

petitioner,

v.

UNITED STATES OF AMERICA,

respondent. /

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION AND DENYING MOVANT'S MOTION TO VACATE, SET ASIDE AND CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

THIS CAUSE is before the court upon the petitioner's motion to vacate, set aside and correct sentence pursuant to 28 U.S.C. §2255 [DE #1], which was previously referred to Magistrate, Judge James Hopkins for proposed findings and a recommended disposition.

Following evidentiary hearing held December 30, 2009 [DE# 25], Magistrate Judge Hopkins filed his Report and Recommendation upon the motion on April 22, 2010 [DE# 37], recommending that the motion to vacate, set aside and correct sentence be denied. On May 6, 2010, petitioner filed his objections to the report of the Magistrate Judge [DE# 38].

The Magistrate Judge determined that the testimony of Attorney Ben Kuehne regarding his advice on petitioner's maximum sentencing exposure and government plea offers was credible, while the testimony of the petitioner on these same subjects was not credible. Those credibility determinations are supported by the record and shall not be disturbed.

The Magistrate Judge also made credibility determinations pertaining to Attorney Maria Elena Perez which the court finds irrelevant and unsupported by the record. The corresponding section of the Magistrate Judge's report pertaining to Attorney Perez, as set forth on pp. 13-16 of the Report, shall therefore be vacated.

With this limited exception pertaining to the Magistrate Judge's findings regarding Attorney Maria Elena Perez, as noted above, the Court approves and adopts all remaining findings and recommendations contained with the Magistrate Judge's Report and Recommendation.

It is accordingly **ORDERED** and **ADJUDGED**:

1. Magistrate Judge Hopkins April 22, 2010 Report and Recommendation [DE # 37] is hereby **APPROVED AND ADOPTED**, with the exception of the discussion of testimony of Attorney Maria Elena Perez, as set forth above.

2. The petitioner's motion to vacate, set aside and correct sentencing pursuant to 28 U.S.C. § 2255 [DE # 1] is **DENIED**.

3. The Clerk of Court is directed to enter this case as **CLOSED** and terminate all pending motions **MOOT**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 13th day of May, 2010.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States
District Judge

Copies furnished to:
United States Magistrate Judge James Hopkins
all counsel

For updated court information, see unofficial website at www.judgehurley.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No, 08-81118-Civ-Hurley/Hopkins
(02-80107-Cr-Hurley)

SEDAR KALAYCIOGLU

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent. /

REPORT AND RECOMMENDATION CONCERNING PETITIONER'S MOTION TO VACATE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 (DE 1) AND DENYING AS MOOT PETITIONER'S MOTION IN LIMINE (DE 21)

(Filed Apr. 22, 2010)

THIS CAUSE has come before this Court upon an order referring the instant petition to the undersigned United States Magistrate Judge for a Report and Recommendation. (DE 410). On October 1, 2008, Petitioner filed a petition to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, claiming that he was prejudiced by the ineffective assistance of counsel at trial. (DE 1,2). The Government filed its answer to the petition on December 16, 2008. (DE 7). Petitioner sought and was granted an extension of time to file his reply, which Petitioner filed on January 21, 2009, (DE 12).

After reviewing the parties' briefs, the Court determined that an evidentiary hearing on Petitioner's first claim was warranted.[1] The Court originally scheduled the evidentiary hearing for August 18, 2009 (DE 14), but granted counsel's request to postpone the hearing until December 30, 2009, (DE 17).

At the conclusion of the hearing, the Court set a schedule for supplemental briefing. In accordance with that schedule, Petitioner filed his supplemental memorandum of law on January 22, 2010 (DE 29, 31), the Government filed its response on February 10, 2010 (DE 33), and Petitioner filed his reply on February 23, 2010 (DE 36). Upon consideration of these matters, and for the reasons explained below, this Court **RECOMMENDS** that Petitioner's § 2255 petition be **DENIED**.

I. Background

On September 10, 2002, Petitioner was arraigned on the initial indictment in the underlying criminal case, (DE 44). On April 10, 2003, a federal grand jury returned a superseding indictment charging the Petitioner with additional crimes amounting to

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[1] In his petition, Petitioner raises four distinct bases for his ineffective assistance of counsel claim (DE 1). The scope of the hearing was limited to the first of these four claims, namely, that trial counsel was ineffective for misinforming Petitioner about his sentencing exposure and for advising Petitioner to reject the Government's plea offer, assuring him that he would be acquitted at trial.

thirteen counts of wire fraud and one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1343, 1346. (DE 171). Specifically, the superceding indictment charged Petitioner with falsely representing himself to be an investment trader licensed by the United States Federal Reserve and furthering a fraudulent investment scheme which resulted in the loss of millions of dollars to his victims.

After his co-defendants pled guilty, Petitioner proceeded to a jury trial on December 1, 2003. On January 22, 2004, the jury returned guilty verdicts on all but Counts 8 and 9. (DE 322). On April 26, 2004, the District Court held a sentencing hearing and sentenced Petitioner to 324 months of imprisonment and ordered him to pay $6,722,592.29 in restitution. (DE 346, 402).

Petitioner filed a timely notice of appeal on May 3, 2004, (DE 349). On December 11, 2006, the Eleventh Circuit Court of Appeals issued its opinion affirming Petitioner's conviction and sentence (*United States v. Kalaycioglu*, 210 Fed. Appx. 825 (11th Cir. 2006)), and on January 31, 2007, *rehearing and rehearing en banc* was denied by the Eleventh Circuit. *See United States v. Kalaycioglu*, 231 Fed. Appx. 947 (11th Cir. 2007). Petitioner appealed to the United States Supreme Court, but on October 1, 2007, the Supreme Court denied certiorari. *See United States v. Kalaycioglu*, 128 S. Ct. 48 (2007).

With the instant petition, Petitioner for the first time claims that his trial attorney, Benedict Kuehne,

Esq., was so ineffective in his representation of Petitioner as to deprive him of his Sixth Amendment right to counsel. Petitioner states that Kuehne was ineffective for: (1) misinforming Petitioner about his maximum sentencing exposure and convincing Petitioner not to accept the Government's plea offer because he would be acquitted; (2) failing to make *Blakely/Booker* objections to sentencing enhancements that were based upon non-jury findings and failing to object to the application of mandatory sentencing guidelines; (3) failing to move to suppress certain tape recordings; and (4) failing to present alleged exculpatory evidence to the jury. (DE 1).

Because the record before the Court was insufficient to make a recommendation with regard to Petitioner's first claim, the Court conducted an evidentiary hearing on December 30, 2009. At that hearing the court heard testimony from six witnesses: Petitioner, Mr. Kuehne, Maria Elena Perez, Esq. (retained by Petitioner to assist Kuehne), Maria Neyra, Esq. (Petitioner's post-conviction attorney), Israel Kaufman (Petitioner's Canadian civil attorney), and Michael Sputo (the FBI case agent).

At the hearing, Petitioner reiterated the assertions raised in his petition, claiming that Mr. Kuehne never advised him about his maximum sentencing exposure and gave him inaccurate estimates about his likely sentence. Petitioner also claimed that Mr. Kuehne advised him not to accept a plea because he would be acquitted at trial.

Mr. Kuehne's testimony, however, directly refuted these allegations. Mr. Kuehne testified that he: (1) advised Petitioner that he had a maximum sentencing exposure of 70 years based on the crimes charged in the superceding indictment (Tr. at pages 14-15, 22, 27, 58, 64), and (2) discussed the possible sentencing ranges Petitioner might receive under the Sentencing Guidelines (Tr. at 27, 46, 59-60).[2] According to Kuehne, Petitioner never asked him to obtain a plea offer from the Government. (Tr. at 34, 54). Rather, Petitioner maintained his innocence throughout the trial and even after his conviction. (Tr. at 34, 36, 52-54). According to Mr. Kuehne, Petitioner "was insistent that he would not enter into any plea that included an admission on his part or any kind of guilt findings." (Tr. at 52). Nevertheless, Kuehne decided to approach the Government about a plea deal just prior to the start of the trial because he believed it would be in his client's "best interest to have [a] discussion of any available options." (Tr. at 54). Kuehne testified that while the Government never made a formal plea offer, the prosecutor told him that if Petitioner was interested in pleading guilty to two counts of the indictment and a ten year sentence, the Government might be willing to make such an offer. (Tr. at 41, 44, 45). According to Kuehne, his client rejected the idea and opted to go to trial. (Tr. at 56). Moreover, Kuehne denied telling Petitioner that he would win the case

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[2] *See* Evidentiary Hearing Transcript dated December 30, 2009. (DE 25).

at trial and Petitioner would be acquitted. (Tr. at 18-19, 65).[3]

II. Timeliness

A petition filed "under 28 U.S.C. § 2255 is subject to a one-year time limitation that generally runs from 'the date on which the judgment of conviction becomes final,'" *Clay v. United States*, 537 U.S. 522, 524 (2003) (*citing* 28 U.S.C. § 2255, ¶ 6(1)); *Kaufmann v. United States*, 282 F.3d 1336 (11th Cir. 2002). The Eleventh Circuit has held that

> a 'judgment of conviction becomes final' within the meaning of § 2255 as follows: (1) if the prisoner files a timely petition for certiorari, the judgment becomes 'final' on the date on which the Supreme Court issues a decision on the merits or denies certiorari, or (2) the judgment becomes 'final' on the date on which the defendant's time for filing such petition expires.

Kaufmann, 282 F.3d at 1339.

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[3] The testimony of the four other witnesses who appeared at the evidentiary hearing was of minimal value. Although they provided some insight into Petitioner's purported understanding of the Sentencing Guidelines, his sentencing exposure, and any plea offers made, none of these witnesses was present for every conversation between Petitioner and Kuehne. The testimony of Maria Elena Perez was particularly troubling to the Court for other reasons, as will be discussed in greater detail below.

For a petitioner who has filed a direct appeal, the clock on the time limit to file a § 2255 petition starts running when the Supreme Court issues its decision, or the time limit to file a writ of certiorari to the Supreme Court expires. *Clay*, 537 U.S. at 525; *Kaufmann*, 282 F.3d at 1337. Thus, if a petitioner fails to file a petition for certiorari, that petitioner's judgment becomes final 90 days after the Court of Appeals' decision is issued affirming the lower court. *Clay*, 537 U.S. at 524; *Kaufmann*, 282 F.3d at 1336.

Here, the Petitioner's clock started running on October 1, 2007, when the Supreme Court denied certiorari. Since Petitioner filed the instant petition on October 1, 2008, within the one-year time limit set forth in 28 U.S.C. § 2255, it is undisputed that the petition was timely filed.

III. Petitioner's § 2255 Claim – Ineffective Assistance of Counsel

In order to determine whether counsel has been constitutionally ineffective, courts are guided by the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that [t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. The Petitioner bears the burden of demonstrating, by a preponderance of the evidence, that his attorney's

performance was unreasonable. *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000).

The Eleventh Circuit has recognized that when asserting a petition based upon a claim of ineffective assistance of counsel, "'the cases in which habeas petitioners can properly prevail . . . are few and far between,'" Chandler, 218 F.3d at 1313 (*quoting Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995)).

The *Strickland* Court proceeded to establish a two prong test that the defendant must meet in order to demonstrate that counsel's performance was ineffective.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

The standard to be used to determine whether counsel's performance was deficient is the objective standard of "reasonableness under the prevailing

professional norms," at 688; *see also Chandler*, 218 F.3d at 1314. The Court further held that courts should be highly deferential in their scrutiny of counsel's performance. *See Strickland*, 466 U.S. at 689 ("Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"). *See also Chandler*, 218 F.3d at 1314-15 ("[a]nd because counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take.").

"A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . " *Strickland*, 466 U.S. at 690; *see also Chandler*, 218 F.3d at 1314 n.14 (courts "must not second-guess counsel's strategy") (*citing Waters v. Thomas*, 46 F.3d 1506, 1518-19 (11th Cir. 1995)). The Eleventh Circuit has held that "counsel cannot be

adjudged incompetent for performing in a particular way in a case, as long as the approach taken 'might be considered sound trial strategy.'" *Chandler*, 218 F.3d at 1314 (*citing Darden v. Wainwright*, 477 U.S. 168 (1986)).

In meeting the prejudice prong of the analysis, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*. 466 U.S. at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694.

The Supreme Court held that there is no need to address a particular prong of the test before the other, nor any reason to address both prongs if the defendant fails to meet either one. *Strickland*, 466 U.S. at 696.

A. Petitioner's Sentencing Exposure and Rejection of Guilty Plea

Petitioner contends that his trial attorney, Ben Kuehne, Esq., was ineffective for failing to advise Petitioner of his sentencing exposure if he went to trial and was convicted. According to Petitioner, Kuehne told him that if he were convicted, his maximum sentencing exposure would be less than ten years. (DE 1 at page 8). Additionally, Petitioner

contends that Kuehne advised him against accepting any plea offer and assured him that he would be acquitted. *Id.* Petitioner claims that "[b]ut for this bad advice" he would have accepted a plea offer. *Id.*

At their core, the allegations raised in the petition's first claim boil down to a credibility contest between Petitioner and Mr. Kuehne. The testimony of these two witnesses stands in direct conflict. Therefore, in considering Petitioner's first claim, the Court must assess the credibility of each witness.

It is well settled that "[t]he credibility of witnesses, the weight to be given evidence, and the reasonable inferences drawn from the evidence fall within the province of the district court." *United States v. Browning*, 252 F.3d 1153, 1157 (10th Cir. 2001) (*citation omitted*). Evidentiary hearings provide the court with an opportunity to assess and compare each witness's credibility. *See United States v. Martinez*, 2009 WL 2485696, *2 (S.D. Tex. Aug. 6, 2009); *United States v. Bahna*, 2009 WL 361861, *5 (C.D. Cal. Feb. 11, 2009) (where petitioner and his former attorney asserted "vastly different facts" regarding his representation, court conducted evidentiary hearing to weigh their credibility). *See also United States v. Peralta-Soto*, 2009 WL 1232267, *6 (S.D. Tex. May 4, 2009) (court conducted evidentiary hearing to assess the witnesses' credibility as to whether counsel told petitioner about his likely sentence).

Here, the Court finds Petitioner's testimony regarding Mr. Kuehne's deficient representation of

him to be unconvincing. Further, the Court's comparison of the two witnesses leads the Court to fully credit Mr. Kuehne's testimony. These conclusions are based on the following factors:

First, the Court is very familiar with Mr. Kuehne and knows him to be a sincere, dedicated and skilled advocate for his clients. This opinion is based not only upon this Court's direct experience with Mr. Kuehne, but also upon Mr. Kuehne's reputation as a trustworthy officer of the Court and a fine criminal defense attorney within this District. Moreover, Mr. Kuehne's testimony during the evidentiary hearing was precise, clear, forthright and compelling and the Court is well satisfied with the soundness of his recollections. His testimony was consistent with his standing as a knowledgeable, adept criminal defense attorney.

By comparison, Petitioner's testimony contained inherent inconsistencies and many of Petitioner's claims do not withstand even minimal scrutiny. For example, Petitioner's claim that he was unaware that his maximum sentencing exposure was 70 years is belied by the record. The superceding indictment clearly indicates a maximum statutory sentence of 5 years for each of the 14 counts charged. (DE 171). Furthermore, Mr. Kuehne's notes and an internal memorandum memorializing his meeting with Petitioner on May 13, 2003 indicate that he carefully reviewed the superceding indictment with his client. *See* Government's Exhibits 1 and 2.

Similarly, Petitioner's claims regarding the Government's plea offers are contradictory. In his petition, Petitioner states,

> [p]rior to the trial, [Petitioner] was told by Mr. Kuehne that the government made a plea agreement offer to him. This plea offer was for substantially less than the 27 years of imprisonment to which he was sentenced. Mr. Kuehne assured [Petitioner] that he would be acquitted so he should not consider the plea offer. Mr. Kuehne said that the plea offer was for [him] to plead guilty, cooperate with the government and that he would receive a reduced sentence of about six months or less.

(DE 1 at page 8). According to Petitioner, if not for Mr. Kuehne's "bad advice" to reject this plea offer, Petitioner would have accepted it. *Id.*

These statements are completely at odds with Petitioner's testimony at the evidentiary hearing, wherein Petitioner alleged that Mr. Kuehne never conveyed a plea offer to him.

Q: [D]id Mr. Kuehne ever tell you about any plea offers from the Government before your trial began?

A: Before my trial, no, no.

(Tr. at page 100).

Q: So your trial began December 1st, 2003?

A: That is correct.

Q: Okay. Do you recall . . . that on the first day of jury selection, did you ask Ben Kuehne about a plea offer that day?

A: Yes, I did.

(Tr. at pages 105-106).

According to Petitioner, Mr. Kuehne told him that he "had not had the time" to obtain a plea offer, but would talk to the prosecution about it. (Tr. at page 106).

Q: Did there come a time later that day when you spoke to Ben Kuehne about the issue of a plea offer?

A: Yes, I did . . . I anxiously ask him what was the plea offer, is there a plea offer, and he said there's no specific plea offer.

(Tr. at page 107).

After observing Petitioner and Mr. Kuehne's diverging accounts regarding Mr. Kuehne's legal representation of Petitioner, the Court finds Mr. Kuehne's account to be the more truthful and accurate version of events.[4] *See, e.g., Greene v. United*

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[4] Petitioner contends that Kuehne was motivated to testify falsely at the evidentiary hearing because a finding that his representation of Petitioner was "constitutionally deficient coming on the heels of Mr. Kuehne's having been indicted in federal court would plainly not be good for Mr. Kuehne's reputation." (DE 31 at page 7). The Court finds absolutely no merit to this argument since the charges against Kuehne were ultimately

(Continued on following page)

States, 191 F.3d 452 (6th Cir. 1999) (where petitioner and his trial attorney presented conflicting testimony regarding petitioner's awareness of his possible prison term, court found testimony of defense counsel to be "more credible" than that of petitioner and concluded that counsel did advise petitioner of his potential sentencing range); *Smith v. United States*, 2002 WL 32297923, *5 (N.D.W.Va. Aug. 13, 2002) (court did not find petitioner's testimony that his attorney promised him an acquittal to be credible). In making this credibility determination, the Court also takes into consideration the District Court's finding that Petitioner committed perjury while testifying in his own defense during the underlying trial. (Tr. at page 136).

In addition, the Court credits as truthful Mr. Kuehne's testimony that he conveyed the possibility of a guilty plea with a ten year sentence to Petitioner. Kuehne's testimony that Petitioner explicitly rejected the idea is also consistent with Petitioner's ongoing assertions of innocence. Kuehne's notes and memorandum from his May 13, 2003 meeting with Petitioner (shortly after he was detained on the

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deemed baseless. Indeed, the Government voluntarily dismissed the indictment with prejudice following an Eleventh Circuit opinion that found the Government's interpretation of the statue Kuehne allegedly violated to be "implausible" and one that would produce "an absurd result." *United States v. Velez*, 586 F.3d 875, 879 (11th. Cir. 2009). Moreover, as discussed above, this Court considers Mr. Kuehne to be a highly reputable and skilled defense attorney.

superceding indictment) state that Petitioner was "unwilling to plead guilty because he has done nothing wrong." *See* Government's Exhibits 1 and 2. In a letter Petitioner wrote to Kuehne shortly after the verdict he stated that it was "very difficult to accept the verdict as an innocent person . . . " *See* Government Exhibit 3. Indeed, even during the evidentiary hearing, Petitioner maintained his innocence. (Tr. at pages 121-22). Given Petitioner's insistence regarding his innocence, it defies credulity that Petitioner would have been willing to accept accountability for his crimes as would have been required under any plea agreement. *See Oliver v. United States*, 292 Fed. Appx. 886, 887 (11th Cir. 2008) (where petitioner maintained his innocence throughout trial and during his sentencing, such undermined his claim that he would have consented to a plea agreement); *Sanders v. United States*, 341 F.3d 720, 723 (8th Cir. 2003) ("A defendant who maintains his innocence at all the stages of his criminal prosecution and shows no indication that he would be willing to admit his guilt undermines his later § 2255 claim that he would have pleaded guilty if only he had received better advice from his lawyer."). Based on the foregoing, the Court rejects Petitioner's assertion that Kuehne never informed him of the possibility of a ten-year plea deal and that if he had known about it, Petitioner would have accepted it.

Finally, even though Mr. Kuehne did not anticipate all of the sentencing enhancements ultimately imposed by the District Court, such is insufficient to

demonstrate ineffectiveness. The case law is clear that "an attorney's mere inaccurate prediction of a sentence does not demonstrate the deficiency component of an ineffective assistance of counsel claim." *United States v. Martinez*, 169 F.3d 1049, 1053 (7th Cir. 1999) (*internal quotations omitted*).

Based on the foregoing, the Court **RECOMMENDS** that the District Court reject Petitioner's first claim of ineffective assistance of counsel.

Maria Elena Perez

To the extent Petitioner attempted to buoy the first claim in his habeas petition with the testimony of his other attorney, Maria Elena Perez, such effort backfired. As Ms. Perez testified at the evidentiary hearing, she was retained by Petitioner to assist Mr. Kuehne in preparing a motion for reconsideration of Petitioner's bond shortly after he was detained on the superceding indictment. (Tr. at page 160). According to Ms. Perez, at that time, Mr. Kuehne told her that Petitioner's "sentencing exposure was anywhere between 51 to 63 months." (Tr. at page 161). Ms. Perez also testified that she was present when Mr. Kuehne told Petitioner that "worst-case scenario, you'll get a couple years, three or four years with good time." (Tr. at page 163). Although Ms. Perez stated that she "read over the indictment" (Tr. at page 173), which indicated a maximum sentencing exposure of 70 years, Perez claimed that she never questioned Kuehne's purported statements about Petitioner's

sentencing exposure, nor did she find his calculations to be "odd." (Tr. at page 181). According to Perez, because she had only been practicing law for a few years at the time, she simply relied on whatever Kuehne told her. (Tr. at pages 163-64, 171-72, 180).

This Court finds Ms. Perez's testimony to be very troubling because, at a minimum, it reveals a deficiency in her representation of her client and, even worse, it suggests untruthfulness. The ill-founded statements that Ms. Perez attributes to Mr. Kuehne, a well-seasoned defense attorney, strain credulity and this Court declines to credit Ms. Perez's testimony. Interestingly, the record also reveals at least one possible motive for Ms. Perez's negative and potentially false testimony about Mr. Kuehne. During the hearing, Ms. Perez testified that Mr. Kuehne had been "rude" to her when he learned that Petitioner had retained her services. (Tr. at page 179). According to Perez, Kuehne told her "you're only to do what I tell you to do." *Id.* Perez testified that Kuehne "reduced [her] to somewhat of a secretary" and that she felt "snubbed." (Tr. at pages 179-180). Whether Ms. Perez sought to settle the score with her testimony is unknowable. Nevertheless, the result is indisputable – rather than buttress Petitioner's credibility, Ms. Perez's testimony only served to undermine it.

Perhaps more significantly, this Court is concerned that there is another possible motivation for Ms. Perez to commit perjury: to enhance her reputation among defendants that she will do anything, including perjure herself, to help the defendant's

cause and thereby make herself more marketable. This Court notes that she came into this case belatedly at the request of the Petitioner.

Notably, this is not the Court's first encounter with Ms. Perez's suspect tactics. In *United States v. Reginald Deriphonse*, No. 07-80154-CR-RYSKAMP, Ms. Perez brought an emergency motion before this Court seeking an Order directing the Bureau of Prisons to provide certain medication to her client. Ms. Perez failed to include a memorandum of law in support of her motion (as is required by the local rules) and also represented to the Court that the motion was unopposed and that the Government agreed to the relief sought. *Id* at DE 25. However, in its response papers, the Government specifically set forth its opposition to the motion. *Id*. at DE 34. At a hearing on the motion, the Court admonished Ms. Perez for improperly seeking relief and possibly misleading the Court. Ms. Perez agreed to withdraw the motion.

In addition, other courts in this District have been critical of Perez's legal skills and veracity. In *Acuna-Acosta v. United States*, Perez failed to perfect an appeal after being instructed to prosecute it and as a result her client's appeal was dismissed. Subsequently, Perez's client filed a §2255 petition for habeas corpus relief on the basis of ineffective assistance of counsel. *See Acuna-Acosta*, 2010 WL 114961 (S.D. Fla. Jan. 12, 2010). The District Court found that Perez's noncompliance with the rules constituted the

ineffective assistance of counsel and warranted habeas relief. *Id.*

Thereafter, a hearing was held regarding Perez's failure to perfect the appeal. That hearing resulted in a Report and Recommendation which found Ms. Perez's statements in defense of her conduct to be "made with wanton and reckless disregard for the truth." *Acuna-Acosta*, 2010 WL 662212 (Feb. 19, 2010). Although the District Court found no evidence of bad faith, the Court noted that "often [Ms. Perez] makes statements of fact recklessly without any effort to determine their accuracy or truth." *Id.* at *5. The Court agreed that "Ms. Perez's explanations in the §2255 proceeding were not credible" and that she refused to "accept responsibility for her actions," but instead was "quick to blame others for her shortcomings." *Id.* at *4. The District Court concluded that Ms. Perez's actions fell below the Florida Bar's standards of conduct and professionalism and referred the matter to the District's Chief Judge for disciplinary action. *Id.* at *5. *See also United States v. Platten*, No 08-80148-CR-Middlebrooks (S.D. Fla. Dec. 14, 2009) (Perez stated in a pleading that she was unable to work, travel, or drive due to medical reasons, so the District Court granted her an eight week continuance, but she appeared before another court the very next day; Perez also represented that she had conferred with opposing counsel prior to filing the motion when in fact she had not).

As these examples indicate, the Court has a reasonable basis for discrediting Ms. Perez's testimony.

B. *Blakely/Booker* Sentencing Issues

Petitioner also alleges that Kuehne failed him in two critical respects during his sentencing hearing: first, by failing to object to the court's imposition of sentencing enhancements based on facts that were not determined by the jury, and second, by failing to object to Petitioner being sentenced under a mandatory Guidelines system. (DE 1 at page 9-11). Petitioner contends that counsel's failure to preserve these issues resulted in the Eleventh Circuit applying plain error analysis to his sentence, which he contends is unconstitutional following *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005).

In *Blakely*, decided on June 24, 2004, the Supreme Court held that the imposition of a sentencing enhancement must be supported by facts that were either admitted by the defendant or found by a jury beyond a reasonable doubt. Shortly thereafter, in *Booker*, the Supreme Court extended the reasoning of *Blakely* to the federal Sentencing Guidelines, and concluded that the mandatory nature of the Sentencing Guidelines rendered them incompatible with the Sixth Amendment's guarantee to the right to a jury trial. *Booker*, 543 U.S. at 231-35. As a result, the Sentencing Guidelines became strictly advisory.

Notably, neither *Blakely* nor *Booker* had been decided by the Supreme Court when the District Court conducted Petitioner's sentencing hearing on April 24, 2004. Nevertheless, Petitioner contends that

Kuehne should have raised such objections at his sentencing hearing. Petitioner contends that had these issues been preserved at the trial court level, his "sentence would have been vacated on appeal." (DE 1 at page 11). However, Petitioner's claim that Kuehne should have foreseen future changes in the law is untenable and does not support a finding of ineffective assistance of counsel.

Indeed, the Eleventh Circuit has stated "we have a wall of binding precedent which shuts out any contention that an attorney's failure to anticipate a change in the law constitutes ineffective assistance of counsel." *United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001) (*citing Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994) ("We have held many times that reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop."). *See also Thompson v. Wainwright*, 787 F.2d 1447, 1459 n. 8 (11th Cir. 1986) ("defendants are not entitled to an attorney capable of foreseeing the future development of constitutional law").

In *United States v. Hayes*, 2007 WL 3231825 (N.D. Fla. Oct. 31, 2007), the defendant made a similar argument, claiming that his trial attorney was ineffective for failing to anticipate *Blakely* and *Booker* and to raise such arguments at his sentencing. *Id.* at *9. The court rejected the argument finding that counsel's failure to raise a claim "based on an area of law then still not settled by the Supreme Court" did not constitute ineffective assistance of

counsel. *Id.* at *10. *See also Estevez v. United States*, 601 F. Supp. 2d 348, 353-354 (D. Mass. 2009) (counsel's failure to preserve *Blakely/Booker* objection before they were decided "was not so objectively unreasonable as to support a finding of ineffective assistance"); *Leon-Medina v. Schriro*, 2008 WL 3286280, *12, n. 8 (D. Ariz. Aug. 7, 2008) (trial counsel's "failure to foresee the subsequent decision in *Blakely* could not constitute ineffective assistance" because "the rule announced in *Blakely* was clearly not apparent to all reasonable jurists, nor was it dictated by precedent . . . [and] counsel's failure to predict future changes in the law, and in particular the *Blakely* decision, is not ineffective because clairvoyance is not a required attribute of effective representation") (*internal quotations and citations omitted*); *Esquivel v. United States*, 2005 WL 1750383, *4 (W.D. Tex. July 26, 2005) (defendant could not show that his attorney's "failure to raise a then-novel Sixth Amendment claim at sentencing . . . fell below an objectively reasonable standard of attorney performance" and therefore, his ineffective assistance of counsel claim was dismissed).

Thus, Petitioner has failed to establish the first prong of *Strickland*, i.e., that his attorney's failure to preserve the objections at sentencing fell below a reasonably objective standard of performance. *See Newman v. Wilson*, 2009 WL 1212262, *20-22 (N.D. Ohio April 30, 2009) (court found that counsel would have had "no reason" to anticipate *Blakely* and

therefore, failure to preserve was not ineffective assistance of counsel).[5]

C. Counsel's Failure to Move to Suppress Evidence

Next, Petitioner claims that he was denied effective assistance of counsel based upon Mr. Kuehne's failure to file a pre-trial motion to suppress certain tape recorded conversations. (DE 1 at pages 12-15). The conversations were recorded by a civilian witness, Larry Schweiger, who was a victim of Petitioner's fraud. The trial transcript reveals that after the Government questioned Mr. Schweiger regarding the creation of the tapes on direct examination, it sought to have the tapes admitted into evidence. *See* Trial Transcript at pages 1373-74, 1396-97, 1493-98 (DE 369). Mr. Kuehne objected to the admission of the tapes, but the District Court noted that federal law permits civilians to record their conversations without the other party's knowledge. *See* Trial Transcript at page 1507 (DE 369). The following day, Mr. Kuehne renewed his objections, but they were overruled by the District Court and the tapes were admitted into

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[5] Petitioner would also be incapable of demonstrating the prejudice prong of *Strickland*, namely, that a preserved objection would have led to a more favorable sentence. As the Eleventh circuit noted, the District Court specifically considered the factors provided in 18 U.S.C. § 3553(a), just as a post-*Booker* sentencing Court should do, and Petitioner was sentenced at the bottom of his Guidelines range. *See United States v. Kalaygioglu*, 210 Fed. Appx. 825 (11th Cir. 2006).

evidence. *See* Trial Transcript at pages 1524-25 (DE 370).

Petitioner contends that Mr. Kuehne was deficient in failing to argue that the tapes should have been suppressed pursuant to 18 U.S.C. § 2511, which precludes the surreptitious recording of a conversation when such communication "is intercepted for the purpose of committing any criminal or tortious act." 18 U.S.C. §2511(2)(d). According to Petitioner, there was "ample basis" for Kuehne to argue that the conversations were intercepted for the unlawful purpose of blackmail or extortion. (DE 1 at page 13).

To succeed on an ineffective assistance claim based on trial counsel's failure to file a motion to suppress, a petitioner must prove (1) that counsel's representation fell below an objective standard of reasonableness, (2) that the suppression motion had merit, and (3) that there is a reasonable probability that the verdict would have been different absent the excludable evidence. *Zakrzewski v. McDonough*, 455 F.3d 1254, 1260 (11th Cir. 2006) (*citing Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)). *See also Morrison v. Schriro*, 2007 WL 4661614, *19 (D. Ariz. June 27, 2007) ("to succeed on an ineffective assistance of counsel claim premised on his counsel's failure to raise an argument, the petitioner must establish that the argument was likely to be successful, in order to prove that he was prejudiced"). Unless counsel's decision not to file a motion to suppress was "a course no competent counsel would have taken under the circumstances," a petitioner cannot show that counsel's

performance was deficient. *Zakrzewski*, 455 F.3d at 1261.

Here, even though Mr. Kuehne made arguments during the trial in an effort to keep the tape recordings from being admitted in evidence, it does not appear that he made a pre-trial motion to suppress the evidence, nor did he make the argument that the tapes should be excluded because they were made for an unlawful purpose. However, such does not amount to the ineffective assistance of counsel because a defendant has "no constitutional right to compel counsel to raise particular claims if counsel, as a matter of professional judgment, decides not to present those issues." *Morrison*, 2007 WL 4661614 at *19. Moreover, to obtain habeas relief, Petitioner must demonstrate that such a motion was likely to be successful. The likely success of such a motion would hinge on whether there was sufficient evidence to demonstrate that when *Schweiger* made the tape recordings, he did so for a criminal or tortious purpose.

The Court has reviewed the portions of the trial transcript wherein *Schweiger* testified regarding his purpose in creating the tape recordings and also Mr. Kuehne's argument to exclude the tapes from evidence. The Court finds insufficient evidence to support Petitioner's argument that Mr. Kuehne could have successfully argued that Mr. Schweiger recorded the conversations for an unlawful purpose. Rather, Mr. Schweiger's testimony reveals that he often recorded business conversations to aid in his recollection

and understanding of the information presented. He testified,

> When you are talking to somebody and you don't understand something, I like to record it in the financial services area, so I can understand, I can listen to what they are saying. If I need to go back and replay it and say, oh, yeah, that is what they meant, that is what they said, that is the reason I recorded them.

See Trial Transcript at pages 1373-74 (DE 369).[6]

Later in his testimony, Schweiger described his purpose in recording his conversation with Petitioner once he suspected the fraud and wanted his money returned to him. Schweiger testified, "we wanted it on record what we were asking for, and we basically wanted to hear him one more time say what we considered to be numerous lies." *See* Trial Transcript at page 1397 (DE 369).

Given Schweiger's testimony, the Court finds that had Mr. Kuehne argued for suppression of the recordings as created for an unlawful purpose, such

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[6] Schweiger also testified that he recorded the conversations to "[m]ake sure I understood what was communicated to me. There was a lot of information, a lot I didn't know and it was easier for me to make sure I had a recording to go back, check my notes, and be clear and be as pointed as I could about what my understanding was. A lot of times it was getting information that I could go back and listen to." *See* Trial Transcript at page 1493 (DE 369).

argument would have been unavailing. *See United States v. Nietupski*, 731 F. Supp. 881, 882-83 (C.D. Ill. 1990) ("Defendant must do more than merely assert" that conversations were recorded for blackmail/extortion; "a party attempting to suppress a recording bears the burden of proving that it was made for an impermissible purpose"). *See also Roberts v. Americable International Inc.*, 883 F. Supp. 499, 503 (E.D. Cal. 1995) (where party taped conversations to "protect herself" and "gather evidence of her supervisor's improper conduct," court found such evidence insufficient to show that tapes were made for purposes of blackmail or extortion). Since such an argument would likely have failed, Petitioner cannot establish that Mr. Kuehne was deficient for declining to make it, nor can Petitioner show that the outcome of the case would have been any different had Mr. Kuehne brought the motion. *See Davidson v. United States*, 213 Fed. Appx. 769, 771 (11th Cir. 2007) (where motion to suppress "would have failed," it was reasonable for counsel not to raise it); *Brown v. United States*, 219 Fed. Appx. 917, 919 (11th Cir. 2007) (where motion to suppress would have failed, there was no prejudice because outcome of case would have been the same).[7]

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[7] In any event, even if Mr. Kuehne had made a motion to suppress and somehow managed to have the tapes excluded from the trial, the Government has put forth the unrefuted claim that the tapes were merely cumulative of other evidence introduced at trial. (DE 7 at page 20). Since there were multiple other sources of Petitioner's lies introduced at trial, the Court finds that the tapes were cumulative evidence that did not affect the outcome of the case. *See Fisher v. Vasbinder*, 2005 WL

(Continued on following page)

Thus, Mr. Kuehne was not ineffective for failing to make a motion to suppress the tapes.

D. Counsel's Failure to Present Exculpatory Evidence

Petitioner's final ineffective assistance of counsel claim is that Mr. Kuehne failed to present a variety of purportedly exculpatory evidence to the jury. (DE 1 at pages 15-19). Specifically, Petitioner claims that his attorney should have called three additional witnesses to testify, presented evidence regarding Petitioner's alleged kidnaping, and attempted to undermine assorted collateral facts alleged by the Government in its prosecution.

"Generally, the decision whether to call a witness rests within the sound discretion of trial counsel." *United States v. Lott*, 2007 WL 1302413, *6 (W.D. Okla. April 30, 2007) (quoting *Jackson v. Shanks*, 143 F.3d 1313, 1320 (10th Cir. 1998)). Indeed, as the Eleventh Circuit has stated, "[w]hich witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if

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2671317, *14 (E.D. Mich. Oct. 18, 2005) (counsel was not ineffective for failing to have evidence suppressed that was cumulative of other evidence introduced at trial); *Rock v. Zimmerman*, 543 F. Supp. 179, 197 (M.D. Pa. 1982) (if evidence petitioner claims should have been suppressed was "merely cumulative" of other evidence properly introduced at trial, then "no prejudice would be discernible.")

ever, second guess." *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004) (*citation omitted*).

Here, Petitioner cannot establish that Mr. Kuehne was ineffective for failing to call J. Kenrick Sproule, Israel Kaufman, and Stephen Renaud as witnesses. Indeed, as the Government notes, Mr. Sproule was essentially an unindicted co-conspirator and Mr. Kuehne's tactical decision to avoid calling a witness who might further weaken his client's case and undermine his client's credibility cannot be deemed ineffective. *See Lott*, 2007 WL 1302413 at *6 (where counsel did not call a witness whose testimony "carried a potential for great harm," defendant failed to overcome presumption of counsel's effectiveness).

Similarly, Petitioner's attorney was not ineffective for failing to call Mr. Kaufman and Mr. Renaud as witnesses because their testimony only related to collateral issues and did not have any bearing on Petitioner's guilt or innocence. *See Smith v. Kemna*, 309 Fed. Appx. 68, 72-73 (8th Cir. 2009) (trial counsel was not ineffective for declining to call witnesses who could only testify as to collateral issues and could not refute victim's testimony); *United States v. Vargas*, 920 F.2d 167, 170 (2nd Cir. 1990) (where proffered testimony of other suggested defense witnesses related only to collateral matters, Court was not persuaded that counsel's decision not to call them was unreasonable). Petitioner's remaining claims regarding "exculpatory evidence" that was not presented to the jury are likewise meritless in that they also related solely to collateral matters.

Finally, Petitioner claims that his attorney was ineffective because he "never sought to admit the Ottawa Police Report regarding [ ] his kidnaping," but Petitioner fails to provide a copy of the report to this Court. *See Stamper v. United States*, 2008 WL 2811902, *11 (E.D. Tenn. July 18, 2008) (where petitioner claimed ineffective assistance for attorney's failure to present audio tape at trial, but failed to submit a copy to the court, his habeas claim was denied). In any event, it appears that counsel made the strategic decision to omit Petitioner's uncorroborated kidnaping claim from the trial because Petitioner did not testify about it. (DE 7 at n. 13). Such is exactly the sort of tactical decision that should not be second-guessed on habeas review. *See Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999) (Eleventh Circuit has noted its "strong reluctance to second guess strategic decisions").

REPORT AND RECOMMENDATION TO THE DISTRICT COURT

Accordingly, this Court **RECOMMENDS** that the District Court **DISMISS** each of the Petitioner's ineffective assistance of counsel claims and **DENY** Petitioner's motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. (DE 1).

NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report and Recommendation with the

Honorable Daniel T. K. Hurley, United States District Court Judge for the Southern District of Florida, within fourteen (14) days of being served with a copy of this Report and Recommendation. *See* Statutory Time-Periods Technical Amendments Act of 2009, H.R. 1626, sec. 6, amending 28 U.S.C. § 636(b)(1) (providing that "within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court"). *See also* Fed. R. Civ. P. 72(b) (2009) ("Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy.") Failure to timely file objections shall bar the parties from attacking on appeal the factual findings contained herein. *See LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. denied*, 488 U.S. 958 (1988); *RTC v. Hallmark Builders, Inc*, 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE and SUBMITTED in Chambers at West Palm Beach in the Southern District of Florida, this 22nd day of April, 2010.

/s/ James M. Hopkins
JAMES M. HOPKINS
UNITED STATES
MAGISTRATE JUDGE

Copies to:

Hon. Daniel T. K. Hurley
Counsel of Record

United States District Court
Southern District of Florida
WEST PALM BEACH DIVISION

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	**Case Number: 9:02CR80107-004**
SERDAR KALAYCIOGLU	(Filed Apr. 30, 2004)
	USM Number: 56304-004
	Counsel For Defendant: Benedict P. Kuehne, Esq.
	Counsel For The United States: AUSA Roger Stefin and AUSA Carolyn Bell
	Court Reporter: Pauline Stipes

The defendant was found guilty on Counts 1-7; 10-14 of the Superseding Indictment on January 22, 2004. The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE		
	OFFENSE	ENDED	COUNT
18 U.S. C. § 1343	Wire Fraud.	June 12, 2001	1-7 and 10-13
18 U.S. C. § 371	Conspiracy to commit wire fraud.	July 31, 2001	14

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on counts 8 and 9 of the Superseding Indictment.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
4/26/2004

/s/ Daniel T. K. Hurley
DANIEL T. K. HURLEY
United States District Judge

April 30th, 2004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 324 months. This term of imprisonment consists of a term of 60 months as to each of Counts 1 through 5 of the Superseding Indictment and a term of 24 months as to Count 6 of the Superseding Indictment, to be served consecutively; and a term of 60 months as to Count and [sic] 7 and Counts 10 through 14 of the Superseding Indictment, to be served concurrently and concurrent to Counts 1 through 6 of the Superseding Indictment.

The court makes the following recommendations to the Bureau of Prisons:

> The court recommend [sic] the term of imprisonment be served at a facility in South Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. This term of supervised release consists of a term of 3 years as to each of Counts 1 through 7 of the Superseding Indictment and a term of 3 years as to each of Counts 10 through 14 of the Superseding Indictment, to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer **at least ten days prior** to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the Bureau of Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act.

If removed, the defendant shall not reenter the United States without the written permission of the Secretary for Border and Transportation Security. Should the defendant be removed, the term of probation/supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of probation/supervised release, he is to report to the nearest U.S. Probation Office within 72 hours of his arrival.

The defendant shall not be engaged in any business that offers securities, investments, or business opportunities to the public. The defendant is further prohibited from engaging in telemarketing, direct mail, or national advertising campaigns for business purposes without the permission of the U.S. Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$1,200.00	**$**	**The total amount to be determined by separate order**

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A lump sum payment of **$1,200.00** is due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment and restitution are payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment and restitution are payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-80107-CR-HURLEY

UNITED STATES OF AMERICA,

Plaintiff,

v.

SERDAR KALAYCIOGLU,

Defendant. /

AMENDED JUDGMENT IN A CRIMINAL CASE

(Filed Jun. 28, 2004)

THIS CAUSE was before the court on June 21, 2004, to established [sic] the amount of restitution owe [sic] the victims by the defendant in the above captioned case. Counsel representing the parties were present and the proceedings were court-reported. For the reasons stated on the record, it is

ORDERED and **ADJUDGED** that:

The Judgment in a Criminal Case imposed on April 26, 2004, is **amended** as follows:

1. The defendant shall pay restitution in the amount of $6,722,592.29 to the victims indicated in the Presentence Investigation Report. Restitution is due and payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order. During the period of incareration [sic], payment shall be made as follows: (1) if the defendant

earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this judgment in a criminal case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations. Upon release from incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay.

2. In all other aspect [sic], the Judgment imposed on April 24, 2004, remains in full force and effect.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 23rd day of June, 2004.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States District Judge

copy furnished:
AUSA Carolyn Bell
Benedict P. Kuehne, Esq.
United States Marshal Service
United States Probation Office
United States Bureau of Prisons